No. 75-1476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellees*

On Appeal from the United States District Court for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	6
The questions are substantial	
I. The court below erred in holding that the requirements of the Administrative Procedure Act contained in 5 U.S.C. § 557(c) can be ignored in agency rate cases whenever the agency determines that timely execution of its functions so requires	10
a. Section 557 is applicable to rate suspension cases	12
b. Section 557(c) was clearly violated by the Commission	14
c. The court below erred in reading the exceptions of section 557(b) into section 557(c)	15
II. The court below erred in holding that the failure of the ICC to afford an opportunity to present argument prior to decision in a rate suspension case comports with the Interstate Commerce Act and the Constitution	19
a. The Interstate Commerce Act was violated	20
b. The constitutional right to due process was violated	20
Conclusion	23

Page

Appendix (bound separately)

Appendix A: Statutes Involved 1a

Appendix B: Opinion of District Court 4a

Appendix C: ICC Decision and Order of December 30, 1974 ..... 13a

Appendix D: ICC Supplemental Report and Order of March 14, 1975 ..... 18a

Appendix E: Notice of Appeal 131a

TABLE OF AUTHORITIES

CASES:

Aberdeen & Rockfish R. Co. v. *SCRAP*, 409 U.S. 1207, 1215 n. 6 (1972) 10

Amarillo-Borger Express v. *United States*, 138 F.Supp. 411, 417 (N.D. Tex. 1956), vacated as moot, 352 U.S. 1028 (1957) 13

American Commercial Lines v. *Louisville & Nashville R. Co.*, 392 U.S. 571 (1968) 2

Arrow Transportation Co. v. *Southern R. Co.*, 372 U.S. 658, 666 n. 13 (1963) 10

Atlanta & St. Andrews Bay Ry. Co. v. *United States*, 104 F.Supp. 193, 200 (M.D. Ala. 1952) 13

Baker v. *United States*, 338 F.Supp. 331, 334 n. 7 (E.D. Pa. 1972) 13

Carl Subler Trucking, Inc. v. *United States*, 313 F. Supp. 971, 978-79 (S.D. Ohio 1970) 16

Central & Southern Motor Freight Tariff Ass'n v. *United States*, 273 F.Supp. 823, 833 (D. Del. 1967) 13

Chicago & E.I.R. Co. v. *United States*, 107 F.Supp. 118, 124 (S.D. Ind. 1952), *aff'd*, 344 U.S. 917 (1953) 13

Dixie Carriers v. *United States*, 143 F.Supp. 844, 851 n. 12 (S.D. Tex. 1956) 13

Kenny v. *United States*, 103 F.Supp. 971, 977 (D. N.J. 1952) 13, 18

Page

Londoner v. *City and County of Denver*, 210 U.S. 373 (1908) 20, 21

Morgan* v. *United States, 298 U.S. 468 (1936) 20

Overnite Transportation Co. v. *United States*, 266 F. Supp. 88, 91 (E.D. Va. 1967) 13

Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co. v. *Backus*, 154 U.S. 421 (1894) 21

Railroad and Warehouse Commission of Minnesota v. *Chicago & N.W. Ry. Co.*, 98 N.W. 2d 60 (Sup. Ct. Minn. 1959) 21, 22

Stanley v. *Illinois*, 405 U.S. 645, 656 (1972) 22

United States v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) 12

United States v. *Florida East Coast Ry. Co.*, 410 U.S. 224 (1973) 12

Watson Bros. Transportation Co., Inc. v. *United States*, 180 F.Supp. 732, 740 (D. Neb. 1960) 13, 16-18

STATUTES AND CONSTITUTIONAL PROVISIONS:

United States Constitution, Fifth Amendment 19-22

Administrative Procedure Act, 5 U.S.C. § 557 .....*passim*

Esch Car Service Act of 1917, 49 U.S.C. § 1(14)(a) ... 12

Federal Aviation Act of 1958, 49 U.S.C. § 1482(g) 10

Federal Communications Act of 1934, 47 U.S.C. § 204 10

Federal Power Act, 16 U.S.C. § 824d(e) 10

Freight Forwarders Act, 49 U.S.C. § 1006(e) 10

Interstate Commerce Act, 49 U.S.C. § 15(7) .....*passim*

Motor Carrier Act, 1935, 49 U.S.C. §§ 316(g), 318(e) .. 10

Natural Gas Act, 15 U.S.C. § 717c(e) 10

Packers and Stockyards Act, § 310 20

Water Carriers Act, 49 U.S.C. § 907(g), (i) 10

28 U.S.C. §§ 1253, 1336, 1398, 2101(b), 2325 2

Page

LEGISLATIVE MATERIALS:

Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 6359, 69th Cong., 1st Sess. at 6 (1926) 13

H.R. Rep. No. 1980, 79th Cong., 2d Sess. at 38-39 (1946) 14-15, 17-18

S. Rep. No. 752, 79th Cong., 1st Sess. at 24 (1945) 14-15, 17-18

92 Cong. Rec. 2158 (1946) (Senator McCarran) 15-18

92 Cong. Rec. 5653 (1946) (Rep. Walter) 17-19

MISCELLANEOUS:

The Attorney General's Manual on the APA at 33-34 (1947) 13

The Federal Administrative Procedures Act: Codification or Reform?, 56 Yale L.J. 670, 684 (1947) 13

Rate Making Powers of the ICC, 31 G.W. L.Rev. 54, 68-69 (1962) 13

Rule Making, 35 Geo. L.J. 491, 498-99 (1947) 13

14 ICC Practitioners' J. 841, 850 (1947) 13

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JURISDICTIONAL STATEMENT

Appellants, The Atchison, Topeka and Santa Fe Railway Company, et al., appeal from an order of a three-judge district court which dismissed appellants' complaint and affirmed an order of the Interstate Commerce Commission ("ICC" or "the Commission") dated December 30, 1974.

OPINIONS BELOW

The opinion and order of the District Court for the Eastern District of Pennsylvania (App. B, pp. 4a-12a) is reported at 403 F.Supp. 1327. The December 30, 1974 order of the Interstate Commerce Commission (App. C, pp. 13a-17a), which the district court affirmed, is not officially reported. The Commis-

sion's supplemental report and order served March 14, 1975 (App. D, pp. 18a-130a) is reported at 350 I.C.C. 228.

JURISDICTION

The order here sought to be reviewed was entered in a suit initiated by appellants in the district court on January 24, 1975, pursuant to 28 U.S.C. §§ 1336 and 1398, to annul, enjoin, and set aside the Commission's order of December 30, 1974 (App., p. 13a), which summarily directed the railroads to cancel a comprehensive readjustment in rates for transporting fresh perishables. A three-judge court was convened as required by 28 U.S.C. § 2325. The judgment of the district court was entered on November 24, 1975, affirming the Interstate Commerce Commission and dismissing the complaint of appellants (App., p. 4a). A notice of appeal was filed in the district court on January 14, 1976 (App. E, p. 131a). The time for docketing an appeal was extended to and including April 13, 1976, by an order signed by Mr. Justice Brennan on March 8, 1976.

Jurisdiction to review the decision of the district court by direct appeal is conferred on this Court by 28 U.S.C. §§ 1253 and 2101(b). *See, e.g., American Commercial Lines* v. *Louisville & Nashville R. Co.*, 392 U.S. 571 (1968).

QUESTIONS PRESENTED

1. Whether the court below correctly held that the requirements of the Administrative Procedure Act contained in 5 U.S.C. § 557(c) can be ignored in agency rate cases whenever the agency determines that timely execution of its functions so requires.

2. Whether the failure of the ICC to afford an opportunity to present argument prior to decision in a rate suspension case comports with the Interstate Commerce Act and the Fifth Amendment to the Constitution.

STATUTES INVOLVED

The statutory provisions pertinent to this appeal are sections 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), and the requirements of the Administrative Procedure Act ("APA") contained in 5 U.S.C. § 557. These provisions are set forth in full in Appendix A, pp. 1a-3a; relevant portions are printed below. Also involved is the Fifth Amendment to the Constitution of the United States.

Administrative Procedure Act, § 8, as amended, 5 U.S.C. § 557

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision . . . . When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that

in rule making or determining applications for initial licenses—

* * *

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Interstate Commerce Act, § 15(7), as amended, 49 U.S.C. § 15(7)

Whenever there shall be filed with the Commission any schedule stating a new individual or

joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint . . . to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased

rates or charges as by its decision shall be found not justified . . . .

STATEMENT

For a number of years, the railroads have believed that their rates for the transportation of fresh fruits and vegetables from the West and Southwest to the Midwest, East and South were inadequate to cover their variable costs. In response to this problem, in May of 1974 the carriers filed with the Commission a comprehensive revision of perishable rates. Upon the filing of protests by affected shippers and receivers, the Commission, acting under the authority of 49 U.S.C. § 15(7), suspended the effectiveness of the new rates for seven months, to and including December 30, 1974. (This is the maximum period of suspension permitted by statute.) The Commission then instituted an investigation into the lawfulness of the proposed rates, entered various procedural orders, and assigned the matter for oral hearing.

Thirty-four days of evidentiary hearings were conducted by an administrative law judge under the conventional adjudicative procedure followed by the Commission. The record consisted of 202 exhibits, many of them lengthy prepared statements, plus transcripts. In cases where rate adjustments of magnitude are involved, it is the usual practice of the Commission to require the parties to separate their evidentiary presentation from their argument, presenting the evidence first and later filing briefs in which they summarize the evidence and argue why the proposed rates are (or are not) just and reasonable and consistent with Commission policy. This is the procedure which was anticipated by the parties

and the administrative law judge in this case. Indeed, during the hearing, the administrative law judge struck matters offered as evidence which could be classed as argument and which he believed were more appropriate for inclusion in briefs.

The oral hearing was not concluded until December 20, ten days before the end of the suspension period. At that time, the administrative law judge directed that concurrent briefs be filed by all parties on February 3, 1975.

Under 49 U.S.C. § 15(7), if a rate suspension proceeding "has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period." (App., p. 3a). Apparently recognizing that the matter would not be decided until after the period of suspension had expired, the Commission issued an accounting order on December 18, 1974 (served December 20) requiring the carriers to keep account in detail of all amounts received as a result of the increased charges taking effect after December 30. The accounting order procedure is specifically provided for in section 15(7), and is customarily followed in rate increase cases where the Commission does not have time to decide the matter prior to the expiration of the suspension period.

Nonetheless, on December 30, 1974, without notice, without rescinding the administrative law judge's directive as to briefing, and without according the railroads any opportunity to be heard in argument on the merits, the Commission issued a four-page order disapproving the new rates and ordering them cancelled, effective 30 days later (App., p. 13a). This

order recited six conclusionary "findings", occupying 24 lines of print, and stated that the "findings" would be "more fully explained in a report to be issued shortly" (App., p. 15a). On March 14, 1975, the Commission served a supplemental report and order (App., p. 18a), which essentially mustered supporting reasons for the December 30 order. It also directed the carriers to pay refunds to shippers who paid the higher rates from December 31, 1974 until the rates were cancelled on January 30, 1975 (App. p. 36a).[1]

Prior to issuance of the supplemental report of March 14, the railroads filed a complaint in the United States District Court for the Eastern District of Pennsylvania, asking the court to set aside the Commission's order of December 30. A motion for a temporary restraining order filed by the railroads was denied on January 27, 1975. On November 24, 1975, the court affirmed the order of the ICC, dismissed the complaint and entered judgment for the appellees (App., p. 12a).

In the court below, appellants argued that the Commission's failure to give the parties an opportunity to submit briefs violated the requirements of the Administrative Procedure Act, 5 U.S.C. § 557 (c), which states that, in any agency proceeding subject to the adjudicative requirements of the APA, the parties must be afforded the opportunity to submit

[1] Appellants believe that this refund order was in error. Refunds should apply only to the portion of a disapproved increase which is determined to be "excessive", rather than, as here, the entire amount of increased charges. If probable jurisdiction is noted, appellants will argue this refund issue in their briefs on the merits.

briefs, proposed findings of fact and conclusions of law and to have those submissions considered prior to decision.

The court rejected this argument, finding that the procedural requirements of section 557(c) need not be complied with because of an exception contained in section 557(b), a provision dealing with intermediate decisions by an examiner or administrative law judge. Secton 557(b) states that in most agency proceedings, the same officer who presides at the reception of evidence must also issue either an initial or recommended decision. But the section goes on to say that in two types of matters (rule making and determining applications for initial licenses), (1) the agency can issue a tentative decision itself or (2) "this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires." The court found that there was no violation of the APA because "under the above-quoted portion of § 557(b), it was imperative that the I.C.C. reach its decision by December 30, 1974" (App., p. 8a). In other words, the court used the exception from section 557(*b*) as justification for denying the opportunity to submit briefs as required by section 557(*c*).

Appellants also argued that the failure to allow briefing violated constitutional due process. The court rejected this claim, holding simply that a "full and fair hearing" was accorded, pointing to the large mass of evidence accumulated in the record and to the desirability of quick action. (App., 10a). By implication, the court held that the right to present argument, oral or by brief, was not a necessary element of due process.

THE QUESTIONS ARE SUBSTANTIAL

I. The Court Below Erred in Holding That the Requirements of the Administrative Procedure Act Contained in 5 U.S.C. § 557(c) Can Be Ignored in Agency Rate Cases Whenever the Agency Determines That Timely Execution of Its Functions So Requires.

Administrative agency proceedings involving suspension and investigation of proposed rates are adversary proceedings in which the carriers who propose the rates are opposed by shippers and other affected parties.[2] The parties submit argument and detailed evidence, including expert testimony, on such matters as the cost of providing the service, the need for additional revenues, and the effect of the new rates on the movement of traffic. The decision of the agency is based upon evaluation of these submissions and resolution of conflicting testimony. This is exactly the type of situation to which the procedural safeguards of the Administrative Procedure Act, 5 U.S.C. § 557 (*c*), were intended to apply, and up until this point the agencies and the courts have uniformly assumed that they do. Adjudicative-type hearings, including an opportunity to submit briefs and proposed findings of fact, are standard procedure in rate suspension cases.

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[2] At issue here are ICC proceedings based on 49 U.S.C. § 15(7). But it should also be noted that similar suspension provisions are included in numerous other regulatory statutes. *See* 49 U.S.C. §§ 316(g), 318(e) (Motor Carrier Act, 1935); 49 U.S.C. §§ 907 (g), (i) (Water Carriers Act); 49 U.S.C. § 1006(e) (Freight Forwarders Act); 47 U.S.C. § 204 (Federal Communications Act of 1934); 16 U.S.C. § 824d(e) (Federal Power Act); 15 U.S.C. § 717c (e) (Natural Gas Act); and 49 U.S.C. § 1482(g) (Federal Aviation Act of 1958). *See* Aberdeen & Rockfish R. Co. v. SCRAP, 409 U.S. 1207 1215 n. 6 (1972); Arrow Transportation Co. v. Southern R. Co., 372 U.S. 658, 666 n. 13 (1963).

In this case, however, the Interstate Commerce Commission violated section 557(c) by denying the parties *any* opportunity to submit briefs or other form of argument or to submit proposed findings of fact prior to decision by the agency. The court below sustained this denial on the basis of an unprecedented interpretation of the Administrative Procedure Act, reading the exceptions of 5 U.S.C. § 557(*b*) into the requirements of section 557(*c*). That is, the court held that since rate suspension cases come within the exceptions contained in section 557(b), the Commission was authorized to omit not only section 557(b) procedures (*i.e.*, a recommended or initial decision by the administrative law judge) but also section 557(*c*) procedures (the right of the parties to submit briefs and proposed findings prior to decision). There is no justification for this novel interpretation, which has no basis in the statutory language, is contrary to the legislative history, and is unsupported by prior decisions of the federal courts or the uniform practice of the agencies.

We submit the authorities clearly establish that the exceptions contained in section 557(b) relate only to the need for an intermediate decision under that section; they have nothing to do with the requirements of section 557(c). In a rate suspension proceeding, the parties *must* be afforded the opportunity to submit briefs and proposed findings, and to receive the other protections specified in section 557(c), *whether or not* an intermediate decision by an administrative law judge is required by section 557(b).

The decision of the court below severely abridges the rights afforded by the Administrative Procedure Act in agency rate proceedings. Hereafter, whenever in a rate suspension case an agency declares that "time-

ly execution of its functions" so requires, it can ignore the procedural protections of section 557(c), despite the obvious need of the parties for those protections. Because the timing of a rate investigation rests within the control of the agency,[3] this holding could effectively nullify the requirements of section 557(c) in such cases. Indeed, the holding below licenses the agency to flaunt those requirements at will. The decision of the district court is a dangerous precedent which should not be allowed to stand.

a. Section 557 Is Applicable to Rate Suspension Cases.

Although the Commission argued in the court below—apparently for the first time anywhere—that the requirements of section 557 are not applicable to rate suspension and investigation cases under 49 U.S.C. § 15(7),[4] the court below assumed the applicability of section 557 and held that the action of the Commission was consistent with that section (relying on the exception contained in 557(b)). The applicability of the adjudicative requirements of the APA to rate suspension proceedings is confirmed (1) by the practice of the agency in such cases (at least up until now), (2) by commentary both before and after the enactment of

[3] Here, more than 108 days of the seven-month suspension period (*i.e.*, more than half) was consumed by delays requested by the protestants and granted by the agency.

[4] The Commission based its argument on a misreading of the decisions of this Court in United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972), and United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973), attempting to extend those decisions, which related only to car service rules under the Esch Car Service Act of 1917, 49 U.S.C. § 1(14)(a), to rate-suspension cases under section 15(7) of the Interstate Commerce Act.

the APA to the effect that parties to rate suspension cases are entitled to an adjudicative-type hearing, including submission of briefs, prior to decision,[5] and (3) by a uniform line of decisions of the lower federal courts which have found, or assumed, that APA adjudicative standards apply.[6] *See*, for example, *Atlanta & St. Andrews Bay Ry. Co.* v. *United States*, 104 F. Supp. 193, 200 (M.D. Ala. 1952), an ICC rate suspension case in which the three-judge court stated that the defendants (the ICC and the United States) "concede in their brief, as they must, that the requirement just quoted [§ 557(c)] is applicable", and held that the requirement was violated.

Since the applicability of section 557 was assumed by the court below, this issue will not be argued further.

[5] *See, e.g.*, the testimony of the ICC on an amendment to section 15(7) in 1926. Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 6359, 69th Cong., 1st Sess. at 6 (1926); The Attorney General's Manual on the Administrative Procedure Act at 33-34 (1947); *The Federal Administrative Procedures Act: Codification or Reform?*, 56 Yale L.J. 670, 684 (1947); *Rule Making*, 35 Geo. L.J. 491, 498-99 (1947); *Rate Making Powers of the ICC*, 31 G.W. L. Rev. 54, 68-69 (1962). *See also*, 14 ICC Practitioners' J. 841, 850 (1947).

[6] *E.g.*, Amarillo-Borger Express v. United States, 138 F.Supp. 411, 417 (N.D. Tex. 1956), vacated as moot, 352 U.S. 1028 (1957); Atlanta & St. Louis Bay Ry. Co. v. United States, 104 F.Supp. 193, 200 (M.D. Ala. 1952); Chicago & E.I.R. Co. v. United States, 107 F.Supp. 118, 124 (S.D. Ind. 1952), *aff'd*, 344 U.S. 917 (1953); Baker v. United States, 338 F.Supp. 331, 334 n. 7 (E.D. Pa. 1972); Central & Southern Motor Freight Tariff Ass'n v. United States, 273 F.Supp. 823, 833 (D. Del. 1967); Dixie Carriers v. United States, 143 F.Supp. 844, 851 n. 12 (S.D. Tex. 1956); Watson Bros. Transportation Co., Inc. v. United States, 180 F.Supp. 732, 740 (D. Neb. 1960); Kenny v. United States, 103 F.Supp. 971, 977 (D. N.J. 1952); Overnite Transportation Co. v. United States, 266 F.Supp. 88, 91 (E.D. Va. 1967).

b. Section 557(c) Was Clearly Violated by the Commission.

There can be little doubt that the requirements of the Administrative Procedure Act contained in 5 U.S.C. § 557(c) were, on their face, violated by the Commission here. Section 557(c) states in part:

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions, or
>
> (2) exceptions to the decisions or recommended decisions . . . and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions. [App., p. 2a.]

The intent of this requirement is explained in the legislative history. Both the House and Senate Committee reports explain that "'supporting reasons' means that *briefs* on the law and facts *must* be received and fully considered by every recommending, deciding, or reviewing officer." H.R. Rep. No. 1980, 79th Cong., 2d Sess. at 39 (1946); S. Rep. No. 752, 79th Cong., 1st Sess. at 24 (1945) (emphasis added). They point out that the opportunity to submit such briefs must be given "*prior to* each recommended or other decision . . . ." *Id.* (emphasis added). They further state that "where the issues of fact are serious and the case becomes one adversary in character, the agency should [also] provide for oral argument before

all recommending, deciding, or reviewing officers." *Id.*[7]

These requirements were not complied with in this case. On December 20, the hearings were concluded and a date was set for the submission of briefs. But ten days later, the Commission, totally disregarding the statutorily-mandated procedures, abruptly terminated the proceeding and finally decided the matter. Although the administrative law judge had specifically excluded argumentative material during the hearing, on the assumption that the parties would have the opportunity to submit arguments later, no such opportunity was ever afforded. Final decision was rendered in a matter involving a lengthy and complex record without affording the parties *any* opportunity for argument. In so doing, the Commission violated section 557(c).

c. The Court Below Erred in Reading the Exceptions of Section 557(b) into Section 557(c).

As indicated, the court below rejected appellants' contention that section 557(c) was violated by relying upon the exceptions contained in section 557(b). The court interpreted these exceptions as applicable not only to the requirements of section 557(*b*) concerning an intermediate decision by an examiner or administrative law judge but also to the requirements of

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[7] Senator McCarran, Chairman of the Senate Committee and floor leader in the Senate, further explained that the subsection "provides that *prior to* each recommended or other decision or review, the parties *must* be given an opportunity to submit for the full consideration of deciding officers, first, proposed findings and conclusions . . . and, second, supporting reasons for such findings, conclusions, or exceptions." 92 Cong. Rec. 2158 (emphasis added).

section 557(*c*) concerning the right of the parties to submit briefs and proposed findings in *all* cases subject to the adjudicative provisions of the APA. This ruling was erroneous. No authority for it was cited by the court below and, to our knowledge, none exists.[8]

The holding of the court is contrary to the language of section 557 and the legislative history. Sections 557(b) and (c) deal with different subjects[9] and the legislative history establishes beyond any reasonable doubt that the exceptions in 557(b) relate only to the procedures required by that section—that is, the intermediate procedure of having an examiner or administrative law judge issue an initial or recommended decision--not to the procedures required by section 557(c).

The Senate Committee chairman and floor leader for the bill explained:

> If the agency makes the initial decision without having presided at the taking of the evidence, whatever officer took the evidence must first make

[8] Indeed in the few cases appellants have found involving both the exceptions of section 557(b) and the requirements of section 557(c), no other court has connected the two. Thus in Watson Bros. Transportation Co. v. United States, 180 F.Supp. 732, 737-40 (D. Neb. 1960), also an ICC rate suspension proceeding, a three-judge court found that the exception of section 557(b) *was* applicable (excusing the Commission from the requirement of issuing an examiner's report) but nonetheless went on to consider whether the requirements of section 557(c) had been satisfied. Carl Subler Trucking, Inc. v. United States, 313 F.Supp. 971, 978-79 (S.D. Ohio 1970), an ICC license application case, was similar.

[9] For example, during the floor debate in the Senate, Senator McCarran (Chairman of the Committee and floor leader) explained that "Subsection (a) of section 8 [now § 557(b)] relates to action by subordinates" while "Subsection (b) of section 8 [§ 557(c)] concerns submittals and decisions." 92 Cong. Rec. 2158.

> a recommended decision, except that, in rule making or determining applications for initial licenses, the agency may instead issue a tentative decision or any of its responsible officers may recommend a decision, or *such* [*inter*]*mediate procedure* may be wholly omitted in any case in which the agency finds on the record that the execution of its functions imperatively and unavoidably so requires. [92 Cong. Rec. 2158 (emphasis added).]

The Senate Committee report further described the exceptions as follows:

> The *alternative intermediate procedure* [with respect to an initial or recommended decision] which an agency may adopt in rule making or determining applications for initial licenses lies in the discretion of the agency. In order to simplify the bill, the exception which confers this discretion is broadly drawn. However, it may be noted that even in those cases, if issues of fact are sharply controverted or the case or class of cases tends to become accusatory in nature, sound practice would require the agency to adopt the intermediate recommended decision procedure. [S. Rep. No. 572, *supra* at 24 (emphasis added).]

See also 92 Cong. Rec. 5653 and the H.R. Rep. No. 1980, *supra* at 38.

The "procedure" referred to in section 557(b) which can be omitted in certain cases under certain circumstances is the "intermediate procedure" of having a recommended or initial decision by an agency employee.[10] Even within the context of 557(b), the

[10] This conclusion is also confirmed by decisions of the lower federal courts. In Watson Bros. Transportation Co. v. United States, 180 F.Supp. 732, 737 (D. Neb. 1960), the three-judge court found that "the exceptions in the Administrative Procedure

exceptions are to be construed narrowly, and in no way do they relate to section 557(c).

Section 557(c) concerns quite different protections —namely, (1) the right of the parties to submit briefs, proposed findings of fact and conclusions of law and to have those submissions considered prior to decision, and (2) the requirement that the agency state its findings and conclusions on all material issues. There are *no* exceptions to the requirements of 557(c). In *all* cases to which section 557 applies, the opportunity to submit briefs *must* be granted. As the House floor leader explained:

> These provisions [of section 557(c)] assure all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision *of any case.*" [92 Cong. Rec. 5653 (emphasis added).]

Similarly, the Senate Committee Report states:

> Prior to *each recommended or other decision* or review the parties *must* be given an opportunity to submit for the full consideration of deciding officers . . . proposed findings and conclusions . . . and supporting reasons for such findings, conclusions, or exceptions." [S. Rep. No. 572, *supra* at 24.]

Substantially identical explanations appear in the House report (H.R. Rep. No. 1980 at 39) and the Senate debate (92 Cong. Rec. 2158).

In ruling that the exceptions contained in section 557(b) also apply to 557(c), the court below acted

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Act [§ 557(b)] were intended to permit the omission of an examiner's report" in certain situations. To the same effect, *see* Kenny v. United States, 103 F.Supp. 971, 977 (D. N.J. 1952).

in a manner inconsistent with the language of the statute and the legislative intent. The ruling of the court is a pernicious precedent which could effectively nullify statutory protections. Indeed, in terms of practical effect, the court might just as well have accepted the Commission's novel argument that the APA adjudicatory requirements do not apply to rate-suspension cases.[11]

II. The Court Below Erred in Holding That the Failure of the ICC to Afford An Opportunity to Present Argument Prior to Decision in a Rate Suspension Case Comports with the Interstate Commerce Act and the Constitution.

Wholly apart from the statutory protections embodied in the Administrative Procedure Act, we submit that the Commission's failure to permit the parties to file briefs violates their right to a "full hearing" under the Interstate Commerce Act and their right to procedural due process under the Fifth Amendment to the U.S. Constitution. In these respects, the decision of the court below, affirming the Commission's action, is in conflict with the decisions of this Court.

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[11] The court below also intimated that any procedural irregularity was remedied by the fact that after the December 30 decision, the railroads filed a petition which "was in the format of a brief and contained arguments regarding the proposed rates." (App. p. 9a.) The opportunity to request reconsideration, however, does not satisfy the statutory mandate. The statute demands that parties be given the opportunity to submit briefs *before* decision, not after. As the House floor leader stated: "These provisions assure all parties an opportunity to present their views of the law and the facts and be heard thereon *prior to the decision* of any case." 92 Cong. Rec. 5653 (emphasis added).

a. The Interstate Commerce Act Was Violated.

Here the Commission acted under the authority of 49 U.S.C. § 15(7) to suspend the effectiveness of the proposed rates. According to this statute, however, whenever suspension is invoked, the applicants are entitled to a "full hearing."

Morgan v. *United States*, 298 U.S. 468 (1936), involved an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies for buying and selling livestock. Under the statute (§ 310 of the Packers and Stockyards Act), the Secretary was required to afford a "full hearing." The Court found that a "full hearing" had not been given, holding that a "hearing" requires at least the following:

> The "hearing" is the hearing of evidence *and argument*. If the one who determines the facts which underlie the order has not considered evidence *or argument*, it is manifest that the hearing has not been given. [298 U.S. at 480-81 (emphasis added).]

These tests were clearly not met in the present case, which involves the same statutory requirement of a "full hearing."

b. The Constitutional Right to Due Process Was Violated.

The decision of the court below is also in conflict with two decisions of this Court based on the constitutional right to due process. In *Londoner* v. *City and County of Denver*, 210 U.S. 373 (1908), this Court held that a state tax law violated the Due Process Clause by failing to give the taxpayer an opportunity to object to an assessment and receive an adequate hearing on his objections. According to the Court:

> . . . a hearing in its very essence demands that he who is entitled to it *shall have the right to support his allegations by argument, however brief*, and, if need be, by proof, however informal. [210 U.S. at 386 (emphasis added).]

And in *Pittsburgh, Cincinnati, Chicago and St. Louis Ry. Co.* v. *Backus*, 154 U.S. 421 (1894), a case involving state taxation of railroad property, the Court held that the right to due process guarantees "a hearing before judgment, with full opportunity to present all the evidence *and the arguments which the party deems important* . . . ." *Id.* at 426 (emphasis added).

Railroad and Warehouse Commission of Minnesota v. *Chicago & N.W. Ry. Co.*, 98 N.W. 2d 60 (Sup. Ct. Minn. 1959), involved a fact situation very close to the present case. There an order of a state commission establishing a railroad rate was appealed by the railroads. One of the grounds of the appeal was that the Commission erred in denying the railroads the right to file a written brief. The Supreme Court of Minnesota held that such denial violated the railroads' right to due process:

> . . . it would appear that in order to satisfy procedural due process requirements there must be, in addition to the opportunity for presentation of evidence, the right to argument, either oral or written.
>
> * * *
>
> The right to present the contentions of the parties and to point out the inferences and conclusions which they believe should be drawn from the evidence, by argument, either oral or written, is as much a part of due process as the right to

> present evidence itself . . . . [W]e now hold that it would be error to deny the railroads the right to argue the case, either orally or by written briefs. Certainly in a case such as this, involving complicated evidence, much of which is in the form of comparison of mathematical computations as to rates in this and other states, the right to file written briefs ought to be freely granted. [98 N.W. 2d at 66.]

The same conclusions are applicable here. Denial of the right to submit briefs violated appellants' right to due process, and the decision of the court below, rejecting this contention, is in conflict with *Londoner, Backus* and *Railroad and Warehouse Commission of Minnesota.*

With respect to appellants' constitutional argument, the court below offered only two responses: (1) a mass of evidence was produced, and (2) it was desirable that the Commission act quickly, because otherwise the new rates would have gone into effect for a longer period of time. Both responses are, we submit, inadequate. As the cases demonstrate, the right to procedural due process encompasses the right to submit argument, as well as evidence. Second, expediency does not justify violation of constitutional rights. As this Court has stated:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. [*Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972)].

Because of the conflict in decisions, and because the issue involves fundamental rules of fair play in administrative agency proceedings, this Court should note probable jurisdiction.

CONCLUSION

For the reasons stated above, the issues here presented are substantial and probable jurisdiction should be noted.

Respectfully submitted,

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